In The

Supreme Court of the United States

OCTOBER TERM 1968

NO. [redacted] 30

WILLIE CARTER SR., JOHN HEAD, REV. PERCY McSHAN,
Appellants

vs.

JURY COMMISSION OF GREENE COUNTY, ALABAMA, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

MOTION TO DISMISS OR AFFIRM

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ATTORNEYS FOR APPELLEES

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The appellees move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the U. S. District Court for the Northern District of Alabama on the grounds that the questions presented are so unsubstantial as not to need further argument.

ARGUMENT

I

TITLE 30, SECTION 21 OF THE CODE OF ALABAMA, 1940, AS RECOMPILED 1958, IS NOT UNCONSTITUTIONALLY VAGUE.

Appellant contends that the standards prescribed by Title 30, Section 21, Code of Alabama 1940, Recompiled 1958, that prospective jurors be, "generally reputed to be honest and intelligent . . . and . . . esteemed in the community for their integrity, good character and sound judgment" are unconstitutionally vague for they provide jury commissioners who are to be guided by them in selecting prospective jurors with "*. . . an opportunity to discriminate on racial grounds,*" in their selection of prospective jurors, in violation of the Fourteenth Amendment to the Constitution of the United States (Appellants' brief, pp. 10-11, Emphasis added).

Based on authority hereinafter discussed Appellee respectfully submits to this Honorable Court that such contention is unsound and unsupported by the decisions of this Honorable Court.

In *Strauder v. West Virginia*, 100 U.S. 303, ___ S. Ct. ___, 25 L. Ed. 664, decided March 1, 1880, this Honorable Court did hold that a State statute which confined jury service to "All white male persons . . . , " who possessed certain qualifications, was a denial to the colored man of the equal protection of the laws because the statute required discrimination against him because of his race. (See *Strauder, supra*, 100 U.S. at p. 303). But this Honorable Court said further:

> "We do not say that, within the limits from which it is not excluded by the [Fourteenth] Amendment, a State may not prescribe the qualifications of its jurors, and in so doing make discriminations. It may confine the selection to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications. We do not believe the 14th Amendment

was ever intended to prohibit this." (See *Strauder, supra*, 100 U.S. at p. 310). [In accord, see *Cassel v. Texas*, 339 U.S. 282 ___ S. Ct. ___, 94 L. Ed. 839, decided April 24, 1950.]

In *Gibson v. Mississippi*, 162 U.S. 567, 16 S. Ct. 904, 40 L. Ed. 1075, decided April 13, 1896, this Honorable Court said of standards, " . . . 'that persons selected for jury service should possess good intelligence, sound judgment, and fair character' . . . are always within the power of a [State] legislature to establish unless forbidden by the Constitution. They tend to secure the proper administration of justice and are in the interest, equally of the public and of persons accused of crime." (See *Gibson*, supra, 100 U.S. at p. 589, cited with apparent approval by this Honorable Court in *Georgia v. Rachel*, 384 U.S. 780, 86 S. Ct. 1783, 16 L. Ed. 2d 925, decided June 20, 1966, 384 U.S. at p. 804).

In *Smith v. Texas*, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84, decided November 25, 1940, this Honorable Court said that the Texas statutory scheme for jury selection which required jury commissioners to take an oath to not knowingly select a grand juror whom they believed unfit or unqualified, was " . . . not in itself unfair; it is capable of being carried out with no racial discrimination." (*Smith, supra*, 311 U.S. at p. 130).

Again, in *Hernandez v. Texas*, 347 U.S. 475, 74 S. Ct. 667, 98 L. Ed. 886, decided May 3, 1954, this Honorable Court said of the aforementioned Texas system of juror selection that it was fair on its face although it was susceptible to abuse and could be employed in a discriminatory manner in violation of the Fourteenth Amendment. (347 U.S. at pp. 478, 479.)

It was in *Hernandez, supra,* that this Honorable Court said that the equal protection of the laws guarantee of the Fourteenth Amendment does not contemplate only two classes —white and Negro—but " . . . that the exclusion of a class of persons from jury service on grounds other than race or color may also deprive a defendant who is a member of that class of the constitutional guarantee of equal protection of the laws." (See *Hernandez,* 347 U.S. at p. 477.)

In *Whitus v. Georgia,* 385 U.S. 545, 87 S. Ct. 643, 17 L. Ed. 2d 599, decided December 23, 1967, this Honorable Court said that " . . . we cannot say on this record that it [discrimination against Negroes] was not resorted to by the [jury] commissioners," (385 U.S. at p. 552) under Georgia statutes requiring that the commissioners "select from the books of the tax receiver *upright* and *intelligent* citizens to serve as jurors, . . . " (385 U.S. at p. 548, Emphasis added), and from that group a sufficient number of "the *most experienced, intelligent, and upright* citizens to serve as grand jurors" (385 U.S. at p. 548, Emphasis added). This was due to the fact that the State offered no explanation for the disparity between the Negroes on the tax digest [the source from which prospective jurors were to be selected] and the percentage of Negroes on the venires, " . . . although the digest must have included the names of large numbers of '*upright* and *intelligent*' Negroes as the statutory qualification required." (385 U.S. at p. 552, Emphasis added.)

Appellee concedes, for arguments sake, that those standards prescribed by and set out in the quoted portion of Title 30, Section 21 of the Code of Alabama, *supra,* might possibly afford the jury commissioners in Alabama with an opportunity to discriminate on racial as well as other grounds in their selection of prospective jurors.

However, Appellee respectfully submits that any objective standards prescribed for the selection of prospective jurors could be susceptible to subjective discriminatory application in the hands of a commissioner so wrongfully inclined. Such mere susceptibility of misapplication does not render the standards unconstitutionally vague, as Appellant contends. And based on the aforementioned cases wherein this Honorable Court has apparently approved similar standards, although holding that they could have been, and in some cases were, misapplied, Appellee respectfully submits that Appellants' contention that the standards are unconstitutionally vague is unsupported by the decisions of this Honorable Court.

II

THE JURY COMMISSION OF GREENE COUNTY, ALABAMA IS CONSTITUTED IN A CONSTITUTIONAL MANNER.

The second question presented by the Jurisdictional Statement suggests that the Jury Commission of Greene County, Alabama is unconstitutionally constituted.

In the complaint filed in this action in the District Court, the plaintiffs sought a judgment declaring that "the Defendant Jury Commission of Greene County, Alabama is a deliberately segregated governmental agency appointed by Defendant Wallace, an official of the State of Alabama, in violation of the Fourteenth Amendment to the United States Constitution."

The District Court in its opinion, said that the "attack on racial composition of the Commission fails for want of proof." (Appellants' Appendix, p. 20a).

The statutes governing the composition of jury commissions in Alabama and the appointments thereto are found in Title 30, Sections 9 and 10, Code of Alabama 1940, as Recompiled 1958. (Appellants' Appendix, p. 29a).

The statutes (Sections 9 and 10, supra), provide that there be three members of the Commission, that they be electors or voters in the county, and that they be reputed for their fairness, impartiality, integrity and good judgment; they also provide that the Governor appoints the members to the Commission.

There is certainly nothing on the face of these two statutes that would cause them to be unconstitutional in any sense, and the District Court has found that the question of whether the statutes had been unconstitutionally applied was not proven.

This leaves petitioners with the argument that Sections 9 and 10, supra, are unconstitutional on their face because the past Commissioners have discriminated in the selection of Negroes for the jury roll. But it is difficult to connect the transgressions of the Commissioners *after* they become such to the process of their being selected as Commissioners so as to taint not only the selection process but the very basis of the authority to have jury commissioners in the first place.

It is suggested that this argument wholly fails to raise the issue of the unconstitutionality on its face of the selection process for jury commissioners in Alabama. Furthermore, the petitioners failed to point out any evidence that was presented to the trial court to establish that jury commissions were unconstitutionally selected or appointed. Nor did they

cite to this court any law which would enable it to decide whether or not the statutes in questions—Sections 9 and 10, supra—were facially unconstitutional.

The Court of Appeals for the Eighth Circuit, in the case of *Moore vs. Henslee*, 276 F. 2d 876, in deciding a question very similar to the one under discussion, said:

> "The focal point of appellants' contention, as advanced in their brief and in oral argument, is that discrimination in the selection of jury panels in Miller County, Arkansas, is necessarily practiced because the Negro race is not represented on the jury commission which is composed of three citizens. It is suggested that 'it is almost impossible' for an all-white jury commission to keep informed of the habits and qualifications of the Negro population so that eligible members of that race can be selected for jury duty. We are not persuaded by this novel argument which fails to find support in either precedent or logic. Adoption of the principle contended for would require indulgence in the unwarranted presumption that jury commissioners entirely of one race will not discharge their 'duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color.' Cassell v. State of Texas, 339 U.S. 282, at page 289, 70 S. Ct. at page 633. Moreover, we are satisfied that the theory advanced by appellants would in reality lead to complexities in the administration of an important facet of our system of trial by juries. Application of the principle contended for, could not, in our view, be limited to the white and negro races. It would encompass all races, and the numerous nationalities and religious denominations existent in this country. The words of Mr. Justice Reed,

speaking for the Court in Akins v. State of Texas, 325 U.S. 398, at page 403, 65 S. Ct. 1276, at page 1279, seem to be peculiarly appropriate:

"'*The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection.* Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination "in the selection of jurors on racial grounds."' (Emphasis supplied.)"

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this appeal should be dismissed or that the decision of the three-judge U. S. District Court for the Northern District of Alabama should be affirmed.

Respectfully submitted,

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ATTORNEYS FOR APPELLEES

CERTIFICATE OF SERVICE

I, Robert P. Bradley, one of the attorneys for the appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 4th day of February, 1969, I served a copy of the foregoing Motion to Dismiss or Affirm upon: Hon. Jack Greenberg, Hon. Norman C. Amaker, Hon. James N. Finney, 10 Columbus Circle, New York, New York 10019; Hon. Orzell Billingsley, Jr., 1630 Fourth Avenue, North, Birmingham, Alabama 35203, Attorneys for Appellants, by depositing a copy in the United States mail, first class postage prepaid, and properly addressed to each of them at the address given.

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